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Supreme Court U.S.
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No. 599

In the Supreme Court of the United States

October Term, 1935.

EDWARD A. LEAHY, *Petitioner,*

vs.

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVIN CORNISH, W. D. HUMPHREY AND JOHN T. BAILEY, AS MEMBERS OF THE OKLAHOMA TAX COMMISSION, *Respondents.*

Appeal from the Supreme Court of Oklahoma.

STATEMENT AND BRIEF OF PETITIONER.

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Appeal from the Supreme Court of Oklahoma.

STATEMENT *and* BRIEF *of* PETITIONER.

Your petitioner in support of the jurisdiction of this court to review the above-entitled appeal respectfully represents:

I.

That this Honorable Court has jurisdiction to review the decision of the Supreme Court of Oklahoma, under section 237 of the Judicial Code as amended by the Act of February 13, 1925, now section 344-B, title 28 of the U.

S. Code, and as further amended or modified by the Act of January 31, 1928, title 28, U. S. C. A., sections 344, 344-B, 861-A and 861-B.

II.

The opinion of the Supreme Court of the State of Oklahoma was filed June 18, 1935 (R. 30), and the dissenting opinion field September 25, 1935. (R. 35) The majority opinion and dissenting opinion are reported in the 49 Pacific Reporter (2d), 571. The federal question of substance, and not heretofore directly determined by this court, is the power and authority of the State of Oklahoma to levy and collect an income tax from members of the Osage tribe of Indians having certificates of competency from the income from the minerals reserved to the Osage tribe of Indians and the royalties from oil and gas leases upon said minerals reserved to the Osage tribe of Indians when such royalties are prorated and paid such members of the Osage tribe of Indians. The Supreme Court of Oklahoma held the pro rata income of such members from such mineral rights was subject to a state income tax.

III.

The petitioner is a member of the Osage tribe of Indians in Oklahoma and is enrolled as such under the Act of Congress of June 28, 1906 (34 St. L. 539), and, under the authority of said act, the petitioner was issued a certificate of competency May 24, 1924. In 1932, the State of Oklahoma, through the Oklahoma Tax Commission, demanded that petitioner make and file with it an income tax return under the state law including therein the amounts paid him as his pro rata share of the proceeds from said mineral resources. This demand the petitioner complied with and,

under notice and protest, paid to the state the tax levied on such return. Thereafter, as provided by the laws of the State of Oklahoma, he brought this action to recover the amount so paid on the theory that the income he received as a member of the Osage tribe of Indians was his proportionate part of the income from the mineral rights reserved to the Osage tribe of Indians, which mineral reserves were under the control of the federal government, and the oil and gas leases were made by the federal government, and it is our position that the mineral reserves to the Osage tribe of Indians, and the management thereof, is a federal instrumentality not subject to a state tax. (R. 8) The cause was submitted to the Supreme Court of the State of Oklahoma on the pleadings, all of the facts being set forth therein, the same being undisputed.

IV.

After the rendition of the judgment by the Supreme Court of the State of Oklahoma, your petitioner filed in this court a petition for writ of *certiorari* to the Supreme Court of Oklahoma, together with a transcript of the record, which was docketed in this court on the 22nd day of November, 1935. On January 6, 1936, this honorable court made an order allowing the writ which was on said day entered, and, under said order, it is provided that the certified transcript of the proceedings below which accompanies the petition for the writ should be treated as though filed in response to the writ.

SPECIFICATIONS *of* ERROR.

1. The Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Oklahoma County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in holding that your petitioner, an allotted Osage Indian, was liable to the State of Oklahoma for state income tax upon his pro rata quarterly payment paid to him as a member of the Osage tribe of Indians, which said income was derived directly from the mineral interests of said tribe, which said mineral interest is held in trust by the United States of America for the benefit of the Osage tribe of Indians.

3. That the Supreme Court of the State of Oklahoma erred in not holding that the income derived by the said petitioner from mineral resources was part of the capital assets of said tribe and, therefore, was not subject to tax on distribution to the members thereof.

4. That the Supreme Court of Oklahoma erred in not holding that the inome from the mineral resources was a part of the restricted corpus of the petitioner's property, and that the taxation thereof amounted to a permanent taking and depletion of such property and, therefore, interferes with a federal instrumentality which is exempt from the state taxing power.

ARGUMENT.

We deem it advisable in presenting this case to the court to go into the propositions as to the status and relationship of the Osage tribe of Indians towards the United States as determined by the various treaties between the Osage tribe of Indians and the United States and the various statutes of the United States.

Prior to the Louisiana Purchase, the Osage tribe of Indians was under the jurisdiction of France, but, by reason of that purchase, they became subjects of the United States. On November 10, 1808, the United States entered into a treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (Kappler's Laws and Treaties, Vol. 2, page 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "*Art. 6.* And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations, respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to-wit: Beginning at Fort Clark, on the Missouri, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the River Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be paid off in such man-

ner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty provides:

> "*Art. 10.* The United States receives the Great and Little Osage Nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer their lands to any foreign power, or to citizens of the United States, or to the inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Louisiana Purchase on the part of the United States to assume the position of guardian and protector of the Osage tribe.

On September 29, 1865, another treaty (Kappler's Laws and Treaties, Vol. 2, page 878) was entered into between the United States and the Osage tribe of Indians, article 10 of which expresses the dependency of the Osages upon the United States, and reads as follows:

> "The Osages acknowledge their dependency on the Government of the United States and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians, and they further agree to use their

best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

> "*Art. 17.* Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the Senate and approved by the President."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this act, Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and acts of Congress establish the trust relation between the United States and the Osage tribe of Indians, but the United States, as a further evidence of such relationship, received from the Cherokee Nation, in trust for the Osage tribe, a deed for the lands from which it now receives its mineral rights, and these same minerals are now held by the United States under such trust deed (Exhibit D, R. 12). The same thereby became a federal agency, by which the United States has

endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to the said tribe and held in trust by the United States.

It is specifically stated in said deed:

"This indenture, made and entered into this 14th day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolf and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part and the United States of America, *in trust for the use and benefit of the Osages and Kansas Indians,* of the second part, witnesseth, that * * * (Italics ours.)

"Whereas, by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation, the sum of One Million, Ninety-nine Thousand One Hundred and Thirty-seven and Forty-one Hundredths Dollars ($1,099,137.41), in payment of said tract of land. * * *

"Therefore, by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three.. * * *

"Said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum mentioned in the Act of March third, eighteen hundred and eighty-three aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these presents, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part forever in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land

lying and being in the Indian Territory embracing the following townships, and fractional townships, north and east of the Indian meridian. * * * "

Further evidencing the intention of the government to retain control over the mineral resources of the tribe, it is provided in the Act of Congress of June 28, 1906 (34 Stat. L. 539, 543), as follows:

"That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made, are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided,* that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; and *provided further,* that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *Provided, however,* that nothing herein contained shall be construed as affecting any valid existing lease or contract."

This is the only form of alienation of these minerals possible under the law.

In the seventh paragraph of section two of said Act of Congress of June 28th, 1906, it is provided:

"That nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the

tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided."

Section 4 of 1912 Act, 37 Stat. L. 86, provides same not affected. By section 1 of 1921 Act and the Act of 1929, 41 Stat. L. 1249 and 45 Stat. L. 1478, the mineral rights are reserved to the Osage tribe to 1959 or otherwise provided by Act of Congress.

In *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36, the Circuit Court of Appeals, Third Circuit, dealing with the right to tax the Osage Indians, said:

> "*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens (*Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Field*, 255 U. S. 257), any legislation by government imposing taxation on its dependent wards must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.
>
> "*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by government on its wards will not be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government. In support of this, reference is made to the *Quapaw Indians*, 34 Opinions Attorney General 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian;' and *Choate* v. *Trapp, supra*, where it is said: 'The construction, instead of being strict, is liberal. Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak

and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with *United States* v. *Rickert,* 188 U. S. 432, and *Elk* v. *Wilkins,* 122 U. S. 94, where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute, but did not pass upon the question as to whether Indians came within the purview of the statute.

In the case of *Chouteau* v. *Burnett,* 283 U. S. 691, 75 L. ed. 1353, there was involved the question as to whether or not the income of a member of the Osage tribe of Indians who had received his certificate of competency, and which income came from his interest in the mineral resources of the tribe, fell within the purview of the federal income tax law. The Supreme Court held that it did.

The question of the right of the state to impose a tax is disposed of in that case under the following language:

"Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power *(Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 72 L. ed. 709, 48 S. Ct. 333, *supra)* on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. * * * "

In the case of *Gillespie* v. *State of Oklahoma,* 257 U. S. 501, 66 L. ed. 338, reference is made to the case of *Pollock* v. *Farmers Loan and Trust Company,* 157 U. S. 429, 39 L. ed. 759. The reference goes to the proposition that where the principal is immune from taxation, the income derived from the principal is also immune from taxation. Dealing with the matter of taxing income received by lessees from restricted Indian land, the courts say that the lease is a governmental instrumentality by which the government fulfills its obligation toward the Indian, and, being a governmental instrumentality, is not subject to tax by the state.

It has been held that the leases held by various companies on restricted Indian land were not themselves subject to a tax. See the case of *C. O. & G. Ry. Company* v. *Harrison,* 59 L. ed. 234.

When the court held that these leases were not subject to ad valorem tax, the state then undertook to collect a tax on the income from the leases, and the *Gillespie* case held that, since the lease itself was not subject to a tax, a tax could not be placed against the income or profit from the lease. In the case of *Pollock* v. *Farmers Loan & Trust Company,* considerable attention was paid to this question by the Supreme Court, and, in that great history-making case, with reference to this particular question, the court said:

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from the land and the growth or produce of the land. Mr. Justice PATTERSON observed in *Hylton* v. *United States,* 3 U. S. 3 Dall. 171 (1:556), 'Land, independently of its produce, is of no value,'

and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus, in *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6:678, 687), it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice MARSHALL said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449 (7:48), it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice THOMPSON and Mr. Justice JOHNSON, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice MARSHALL delivering the opinion, overruled that contention.

"So, in *Dobbins* v. *Erie County Comrs.*, 41 U. S. 16 Pet. 435 (10:1022), it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 65 U. S. 24, How. 169 (16:644), it was held that a duty on a bill of lading was the

same thing as a duty on the article which it represented; in *Northern Cent. R. Co.* v. *Jackson,* 74 U. S. 7 Wall. 262 (19:88), that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security; and in *Cook* v. *Pennsylvania,* 97 U. S. 566 (24: 1015), that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326 (30:1200), 1 Inters. Com. Rep. 308, and *LeLoup* v. *Mobile,* 127 U. S. 640 (32:311), 2 Inters. Com. Rep. 134, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the case at bar, the mineral interests of the Osage tribe of Indians is not subject to a tax; therefore, the interest that each individual allottee has in the tribe's mineral interests is not subject to a tax.

In the Indian cases the courts use the term "Federal Instrumentalities," but that is only for the purpose of showing that the source is non-taxable, and it does not differ from any other character of taxation such as is mentioned in the case of *Pollock* v. *Farmers Loan and Trust Company, supra.*

None of the statutes relating to the Osage Indians provides for a tax or authorizes a tax on personal property of members of the tribe, but do authorize taxes on certain real estate, exempting from taxes the homestead allotment of the allottee. It is entitled to cosideration that statutes are silent on the right to tax propery of members of the tribe other than real estate, but the statutes are not silent on the question that the personal property involved in this action is trust property until turned over to the allottee. They are not trust property by virtue of any independent act of the Secretary of the Interior, but they are trust

property by virtue of the laws with reference thereto. In construing statutes with reference to Indian matters, the requirement is that the construction shall be made which is most favorable to the Indian, and to that extent all legislation affecting Indians a different rule prevails than that which prevails with reference to the construction of other statutes.

In the case of *Elk* v. *Wilkins*, 112 U. S. 94, it is said:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and the Senate, or through Acts of Congress in the ordinary form of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

And in *Choate* v. *Trapp*, 224 U. S. 665, the Supreme Court of the United States said:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years and has been applied in tax cases.

"For example, in *Kansas Indians (Blue Jacket* v. *Johnson County)*, 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice DAVIS, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice MARSHALL who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning.' Again, in *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws."

The fact that the Osages have been granted citizenship under the Act of March 3, 1921, can have no effect on this question. See *United States* v. *Celestine*, 215 U. S. 278, 54 L. ed. 195, in which it is said:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remain Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress

intended by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

See, also, *United States* v. *Nice*, 241 U. S. 591, 60 L. ed. 1192, in which it is said:

"As pointing to a different intention, reliance is had upon the provision that when the allotments are completed and the trust patents issued, the allottees 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state' of their residence. But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal re-

lation and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable.

"We recognize that a different construction was placed upon paragraph 6 of the Act of 1887, in *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, but, after re-examining the question in the light of other provisions in the act, and of many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled. Judgment reversed."

Section 7 of the Act of Congress of April 18, 1912 (37 Stat. L. 86), Barney's Osage Laws 63, contains the proviso:

"That nothing herein shall be construed so as to exempt any such property from liability for taxes."

In the case of *Hudson* v. *Hopkins,* 183 Pac. 507, the Supreme Court of the State of Oklahoma construed this provision as authorizing the taxation of the homestead allotments of deceased Osage allottees, but in the case of *United States* v. *Mullendore,* 35 F. (2d) 78, the Circuit Court of Appeals of the Eighth Circuit took the opposite view to what the Supreme Court of the state took, and held that the only purpose of that provision was to leave the taxability of Osage lands just the same as it was prior to the passage of that act. The reasoning will apply equally to this income.

There is no federal statute authorizing the state to tax any of the funds or moneys turned over to the individual members of the tribe derived from tribal sources. Without such express authority the state is powerless to impose the tax. See *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, hereinafter referred to. The only provisions are with reference

to real property. The source from which such income is derived is non-taxable, and, therefore, the income is non-taxable. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338.

Section 5 of the Allotment Act (June 28, 1906), 34 Stat. L. 539, at page 545, reads as follows:

> "*Sec. 5.* That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys and mineral interests, except as hereinbefore provided."

This clearly shows the source to be non-taxable.

With reference to the right of the state to impose a tax on products of a mine on Indian lands, the Supreme Court of the United States, in the case of *C. O. & G. Ry. Co.* v. *Harrison*, 59 L. ed., page 234, held that such property was not subject to a tax. The syllabus in that case reads as follows:

> "The gross revenue tax imposed by Oklahoma Act of May 26, 1908, section 6, upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal produced, 'which shall be in addition to the taxes levied and collected upon an ad valorem basis upon such mining property and the appurtenances thereunto belonging,' is an occupation or privilege tax which can not be exacted from a federal instrumentality acting under congressional au-

thority, such as the corporate lessee, under the authority of the Curtis Act of June 28, 1898 (30 Stat. L. 495, chapter 517), of coal mines upon segregated and unallotted lands belonging to the Choctaw and Chickasaw Indian tribes."

And in the opinion, on page 237, the court says:

"It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty and to subject them to a uniform ad valorem tax, for it seems to us clear that the Act of 1908 provided no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We can not, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of the property liable to a general assessment—provision is made for determining that upon a different basis. *Meyer* v. *Wells, F. & Co.*, 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218. The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require, but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. *Pullman Co.* v. *Knott*, decided at the present term (235 U. S. 23, *ante* 105, 35 Sup. Ct. Rep. 2)."

In *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, 66 L. ed. 338, the Supreme Court of the United States, in dealing with the power of the state to collect a gross production tax on oil produced in Osage County, held that the state was without authority to impose such tax. Paragraph one of the syllabus reads as follows:

"A state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage In-

dian lands from sales of his share of oil and gas received under his leases."

In that case the court approved of the principles laid down in the case of *C. O. & G. Ry. Co.* v. *Harrison, supra,* and applied the same principle to the production of oil in Osage County. In the opinion, on page 341, the court says:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void *(Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912)—a rule lately illustrated by *Evans* v. *Gore,* 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519, 40 Sup. Ct. Rep. 550, and applied in a case somewhat like the present by the Supreme Court of Hawaii *(Oahu R. & Land Co.* v. *Pratt,* 14 Haw. 126). Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the profits of the leases, and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms that it can for its wards. *Weston* v. *Charleston,* 2 Pet. 449, 468, 7 L. ed. 481, 488. The taxation of cattle grazing on Indian lands held valid in *Thomas* v. *Gray,* 169 U. S. 264, 273, 42 L. ed. 710, 714, 18 Sup. Ct. Rep. 340, obviously is more remote. As a writ of error lies in this case, the petition for *certiorari* that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant,* December 12, 1921 (257 U. S. 282, *ante,* 239, 42 Sup. Ct. Rep. 106)."

In the recent case of *Jaybird Mining Company* v. *Weir,* 271 U. S. 609, 70 L. ed. 1112, the state undertook to tax ore that had been mined from restricted Indian land and was

stored in a bin until such time as it should be sold. The Supreme Court of the United States held that the same was not taxable, on the theory that the attempt to tax would be to tax the federal agency. Paragraph three of the syllabus in that case reads as follows:

> "Ore in possession of a lessee, which was taken from restricted property of a Quapaw Indian leased by the Government for development, from which the interests of the Indian have not been segregated, is not subject to state taxation."

In the opinion, at page 1114, the court says:

> "The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the acts referred to. It is the duty and established policy of the government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. *United States* v. *Noble*, 237 U. S. 74, 59 L. ed. 844, 35 Sup. Ct. Rep. 532; *Goodrum* v. *Buffalo*, 89 C. C. A. 525, 162 Fed. 817. The lessee is an agency or instrumentality by the government for the development and use of the restricted land and to mine the ores therefrom for the benefit of its Indian wards. *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. *It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And, without congressional consent, no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.' *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see *Farmers and M. Bank* v. *Minnesota*, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; *Choctaw O. & G. R. Co.* v. *Harrison, supra; Gilles-*

pie v. *Oklahoma*, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rep. 171." (Italics ours.)

The case of *McCurdy, County Treasurer*, v. *United States*, 246 U. S. 263, 62 L. ed. 706, is not authority for the tax in this case. In that case, trust funds were paid to the allottee under the provisions of the Act of Congress of April 18, 1912 (37 Stat. L. 86), which provides in section 5 thereof that the Secretary of the Interior may, in his discretion, pay to members of the tribe all or part of their funds in the Treasury of the United States; provided, he shall first be satisfied by the competency of the allottee or that the release of the same would be for the best interest of such member, but there is no provision giving the Secretary control over the fund after it is paid over to the member. Under this act, a part of the funds held in trust for Robert Panther, an Osage allottee, were first turned over to a trustee for Robert Panther, and later by such trustee to Panther, with which funds he purchased a home in the City of Pawhuska, and which home at the time of its purchase was subject to taxation. The Supreme Court in that case held that the fund having been released to the Indian under the Acts of Congress, and then later by him used in the purchase of a home, that the fact that there was a recital in the deed to the effect that the land could not be sold or encumbered without the approval of the Secretary of the Interior would not have the effect of relieving such land from taxation. There was no attempt on the part of the state to tax the money. It was only an attempt to tax already taxable real property in which money had been invested, and, if there were no restrictions placed on the money after it was turned over to Panther, then when he invested it in taxable property, the property still remained subject to taxation. It cannot be said that

this decision is in any way controlling in the controversy here.

Nor is the case of *A. S. J. Shaw, State Auditor,* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 578, 72 L. ed. 709, authority for the tax in this case. The facts in that case are that the defendant took an oil and gas lease from a full-blood Creek Indian on the land which was purchased for said Indian by the Secretary of the Interior out of oil and gas royalties received by said Indian from restricted lands. The Secretary of the Interior admitted that this land, bought for this Indian, was subject to an ad valorem tax, and as a consequence, paid the taxes for such Indian on such land out of the funds of the Indian. It was contended by the oil company that, notwithstanding the taxability of the land itself, it was a federal agency through which the government of the United States was carrying out its duty toward the Indian in question and, therefore, was not subject to taxation. The court held that it was not such a federal agency and that, therefore, it was subject to the tax sought to be imposed by the State of Oklahoma. The court held, *first,* that the land was subject to taxation, because it was not allotted land and no authority was given by Congress to withdraw such land from taxation, and, *second,* that the tax claimed against the oil corporation was not an attempt to tax a federal agency or instrumentality. Evidently the state had no power to tax money that was used for the purchase of this land for the Indian, but the investment of the same in taxable real property did not withdraw such property from state taxation without there being some specific declaration in the Act of Congress to that effect.

Status of petitioner so far as the income in question is concerned is the same as a member of the tribe without a certificate of competency.

The petitioner is a member of the Osage tribe of Indians duly enrolled as such under the Act of Congress of June 28, 1906. At the time of the passage of said act, his status as an Indian was the same as every other member of the Osage tribe regardless of the quantum of blood—in fact no distinction was made between members of the tribe on the question of the quantum of blood until the Act of Congress of March 3, 1921, which will be hereinafter referred to.

There was a provision in the Act of Congress of June 28, 1906, for the granting of what is called a "certificate of competency" to members of the Osage tribe of Indians by the Secretary of Interior upon application of said Indians provided the Secretary of the Interior found the applicant fully competent and capable of transacting his or her own business and caring for his or her own affairs. Said provision is the seventh paragraph of section 2 of the Act of Congress of June 28, 1906 (34 Stat. L. 539), and reads as follows:

> "That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded to him by reason of this act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; *provided*, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead)

shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; *provided,* that the surplus lands shall be non-taxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; and *provided further,* that nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; and *provided, further,* that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It will be noted that the privilege granted by such certificate of competency was that the Indian was permitted to sell and convey any of the lands deeded him by reason of said act except his homestead, and that was the extent of the difference between a member of the tribe who was granted a certificate of competency and one who was not—in all other matters, they were the same.

The question as to the effect of the granting of a certificate of competency was before the Supreme Court of Oklahoma in the case of *Neilson* v. *Alberty,* 36 Okl. 490, 129 Pac. 847. In passing upon the question of the effect of the granting of a certificate of competency, the court said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Invest-*

ment Co., 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 656, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the statute authorizing the issuance of certificate of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

And this construction has been followed by that court ever since.

The Act of April 18, 1912 (37 Stat. L. 86), section 3, gives the County Courts of Oklahoma jurisdiction in probate maters to appoint guardians and administer all estates of the allottees of said tribe without regard to the facts as to whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

Section three of said act reads as follows:

"*Sec. 3.* That the property of deceased and of or-

phan minor, insane or other incompetent allottees of the Osage tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma, but a copy of all papers filed in the County Court shall be served on the Superintendent of the Osage Agency at the time of filing, and said Superintendent is authorized, whenever the interests of the allottees require, to appear in the County Court for the protection of the interests of the allottee. The Superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the County Court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety as the County Court shall determine. Every bond of the executor, administrator, guardian or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto; *provided*, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said mi-

nor is being wasted or misused by such parents; *provided, further*, that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior."

It will be noticed that this act makes no distinction between those members of the tribe that have a certificate of competency and those that do not have the same. If the petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend and control a proceeding instituted by or against him in the County Court of Oklahoma? Prior to the passage of this act the state courts had no jurisdiction over an Osage Indian estate.

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *provided,* that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Prior to this enactment, an Osage could not made a valid will nor can he now, without the approval of the Secretary of the Interior, even though he has a certificate of competency.

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood. Congress in the exercise of its power could legislate the same way with reference to Indians of less than half blood.

Section 5 of this act is as follows:

> "No person convicted of having taken or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indian any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *provided,* that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with the petitioner, he being an Osage Indian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

—*Ramsey* v. *United States,* 271 U. S. 468, 70 L. ed. 1039;

In re Dennison, 38 F. (2d series) 662.

The question of the status of members of the tribe has been before the Federal District Court and the Supreme Court of the United States. In the case of *LaMotte & LaMotte* v. *United States,* 254 U. S. 570, 65 L. ed. 410, and dealing with the status of members of the Osage tribe, the Supreme Court used this language:

"The Osages have not been fuly emancipated but are still wards of the United States."

This quotation, of course, referred to members of the tribe having certificates of competency for, in that case, there was no contention that an Indian of the Osage tribe who did not have a certificate of competency was not fully and completely under the control and jurisdiction of the United States.

In the more recent case of the *United States* v. *John Ramsey and Wm. K. Hale,* 271 U. S. 468, 70 L. ed. 1039, the Supreme Court of the United States had before it the question of validity of an indictment against John Ramsey and Wm. K. Hale, both white men who were charged with the murder of Henry Roan, a full-blood Osage Indian who had a certificate of competency. The murder was alleged to have been committed on an allotment belonging to another member of the Osage tribe of Indians who did not have a certificate of competency. It was the contention of the counsel for Ramsey and Hale that the United States did not have jurisdiction of the case because, *first,* that the land where the homicide was committed was not Indian country and, *second,* because the United States no longer had jurisdiction of the offenses of this character committed in Osage County, Oklahoma. This involved the question not only of the status of the land but of the status of the members of the Osage tribe of Indians. The fact that Henry Roan had a certificate of competency was not given any consideration by the Supreme Court, but the case was considered from the standpoint of the federal statutes with reference to the offenses committed in Indian country, the court holding that the allotment in question was Indian country because it was still subject to supervision and control of the Secretary of

the Interior; also, under the statute which makes it a violation of the federal law in a state to kill an Indian in Indian country within the limits of the state. The court held the indictment to be good and directed the trial of Ramsey and Hale in the federal courts. In discussing the question of the status of the Indians in the opinion, the court said:

> "But the authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before (*Donnelly* v. *United States*, 228 U. S. 243, 271, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913-E, 710), in virtue of the long settled rule that such Indians are wards of the Nation in respect of whom there is devolved upon the Federal Government, 'the duty of protection, and with it the power' (*United States* v. *Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109). The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the Nation (*United States* v. *Osage County*, 251 U. S. 128, 133, 64 L. ed. 184, 187, 40 Sup. Ct. Rep. 100; *United States* v. *Nice*, 241 U. S. 591, 598, 60 L. ed. 1192, 1195, 36 Sup. Ct. Rep. 696), and it rests with Congress alone to determine when that relationship shall cease (*Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506; *United States* v. *Celestine*, 215 U. S. 278, 290, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93)."

The District Court of the United States for the Western District of Oklahoma in *Quarles* v. *Dennison*, 38 Fed. (2d) 662, in a bankruptcy case involving an Osage Indian with a certificate of competency, in paragraphs one and two of the syllabus states the status of the bankrupt as follows:

> "A 'competent' Osage Indian is one having certificate of competency which gives him certain rights as to disposal of his property.

"Under Osage Allotment Act (Act June 28, 1906, 34 Stat. 539) and amendments thereto, Act of March 3, 1921, 41 Stat. 1249, and Act of March 2, 1929, 45 Stat. 1478, an Osage Indian of less than half blood with certificate of competency, or with restrictions removed, does not have right to dispose of his trust fund or his trust estate."

And, in the opinion in the case with reference to the status of the bankrupt, the court said:

"Counsel for the trustee insist in their brief that a member of the Osage tribe of less than half blood, who has received a certificate of competency, has all the rights of a white man, and that he can dispose of any of his property. I cannot agree with the learned counsel, nor do I find any decisions which were cited in their brief to justify that contention. A member of the tribe receiving a certificate of competency could, prior to the Act of March 3d, 1921, dispose of any property which he had, including his surplus land, but could not dispose of his homestead during the trust period.

"Section 3 of the Act of March 3d, 1921 (41 Stat. 1249), gave to an Osage Indian of less than half Indian blood the additional right to dispose of his homestead, but no power was given in this act or any other act to dispose of or incumber in any way his interest in the trust estate."

A fair construction of the various Acts of Congress with reference to the Osage tribe of Indians will disclose that Congress has been very slow in relieving itself of its duties and obligations toward the tribe and its members or as has been said "slow in emancipating them." It has granted to certain members certificates of competency authorizing such members to do certain things without being controlled by the United States; it has declared all members

of the tribe to be citizens of the United States, but has specifically reserved to the Government the control and management of the tribe's affairs; it has given to the County Courts of Oklahoma jurisdiction with reference to the estates of deceased members of the Osage tribe of Indians, and with reference to guardianships, with certain limitations and restrictions. For instance, it has provided that copies of all papers must be served upon the Superintendent of the Osage tribe of Indians, and this has been held to be a condition precedent to the County Court obtaining jurisdiction over Osage estates or to act on the same.

In the case of *In re Guardianship of Winnett: Wright, Superintendent,* v. *Riber, et al.,* 112 Okl. 43, 239 Pac. 603, the Supreme Court of Oklahoma held that the Superintendent of the Osage Agency is a necessary party to the proceedings and is entitled to notice. In the opinion, the court says:

> "The Superintendent is therefore a necessary party to the action so far as the notice of its pendency is concerned, and his plea to the jurisdiction of the court and to the hearing being had on the date the petition was filed was proper and timely."

In the case of *In re Pitts: Wright, Superintendent,* v. *Citizens Trust Company,* 115 Okl. 116, 242 Pac. 1036, the Supreme Court of Oklahoma held that it was necessary for copies of all papers in guardianship matters to be filed with the Superintendent of the Osage Agency as required by Act of Congress of April 18, 1912, before the court could acquire jurisdiction. In the opinion, the court says:

> "The first proposition presented by the appellant is that the Superintendent of the Osage Agency is a necessary party to every proceeding in the County

Court respecting the property of a deceased or orphan minor, insane, or other incompetent allottees of the Osage tribe of Indians, and that, as it is admitted, no notice of the application of the Citizens Trust Company, guardian, was had upon the Superintendent of the Osage Agency, the County Court was deprived of jurisdiction to make the order complained of and the District Court of Osage County was without jurisdiction to approve the said order of the County Court."

It has also provided that guardians for members of the Osage tribe of Indians of one-half or more Indian blood, whether they had certificates of competency, or not, could not be appointed without the approval of the Secretary of the Interior. In section one of the Act of February 27, 1925 (43 Stat. 1008), is found this language:

"No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage tribe of Indians who does not have a certificate of competency, *or who is of one-half or more Indian blood.*"

It is also provided in section 1 of said act:

"All payments to legal guardians of Osage Indians shall be expended subject to the joint approval in writing of the court and the Superintendent of the Osage Agency."

Prior to authorizing the County Courts of Osage County and Oklahoma, to assume jurisdiction in these matters, the courts had no jurisdiction over the affairs of the Osage tribe of Indians, and all the affairs of the Osage tribe of Indians were subject to disposal by the Secretary of the Interior whose duty it was, prior to authorizing the courts to settle estates, to determine the

heirs and settle the estates of the deceased members of the tribe. This petitioner cannot make a valid will with reference to his property without the approval of the Secretary of the Interior under the Act of Congress of April 18, 1912, hereinbefore referred to. How it can be said that the status of this petitioner is that of a white man, or that he is no longer a ward of the government is beyond comprehension in view of the various Acts of Congress and the various decisions of the courts with reference thereto.

Under the Act of Congress of April 12, 1924 (43 Stat. L. 94), it is provided "that any right to, or interest in, the lands, monies, or mineral interests as provided in the Act of Congress approved June 28, 1906, entitled 'an act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' and acts amendatory thereof or supplemental thereto, vested in, determined or adjudged to be the right or property of any person not an Indian by blood may with the approval of the Secretary of the Interior and not otherwise be sold, assigned and transferred under such rules and regulations as the Secretary of the Interior may prescribe." Congress here definitely provided a means for those of non-Indian blood, who inherited or received by will property of members of the Osage tribe of Indians to sell or dispose of the same subject to the approval of the Secretary of Interior and not otherwise. This Act of Congress further demonstrates the status of a member of the tribe having a certificate of competency with reference to his part in the tribal property. It is a well established principle of law that, where there is an act of this kind authorizing certain classes to do certain things, it has the effect of preventing other

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classes not given this privilege from doing the same thing and clearly demonstrates that no member of the tribe whether with or without a certificate of competency could in anywise sell or dispose of his interest in the tribal property.

The opinion in the case of *Taylor* v. *Tayrien*, 51 F. (2d) 884, goes direct to the proposition of the status of a member of the Osage tribe of Indians having a certificate of competency with reference to his so-called headright or mineral interests, and on page 890 thereof, the court says:

> "*(8)* It is also plain that while Congress has found apt words to free from restrictions the surplus allotments of some Indians and the homesteads of others, it has refrained from the use of any such language as to headrights, except in the one case of non-Indian owners, and then only with the approval of the Secretary. When we start with a situation where no one of these classes of property — surplus, homestead, and headrights—is alienable, and **where** by the gradual process of legislation, first one class (surplus) is freed from restrictions in the hands of certain tribal members; and later another class (homesteads) is freed in the hands of other members; and still later the third class (headrights) is freed in the hands of non-Indians; in such a situation it seems impossible to say that Congress intended the third class to be alienable by any other person than the non-Indian specifically covered. Moreover, it has long been the policy of this government to construe statutory language in favor of the Indians. In *Choate* v. *Trapp*, 224 U. S. 665, 675, 32 S. Ct. 565, 569, 56 L. ed. 941, the court said: 'But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'."

This opinion is rather long and is a very complete analysis of the federal statutes with reference to the Osage tribe of Indians and particularly concerning the matter of the status of a member of the tribe with a certificate of competency and with reference to the so-called headright.

This court in the case of *DeNoya* v. *Arrington, Executor* (not yet officially reported); 20 P. (2d) 563, 568, found in December 16th, 1932, issue of the Oklahoma Appellate Court Reporter on page 541, gave an extensive review of the federal statutes and quoted at length with approval from the case of *Taylor* v. *Tayrien, supra.*

Chouteau* v. *Burnett.

Much stress was put upon the case of *Chouteau* v. *Burnett,* 283 U. S. 691, 75 L. ed. 1353, in the lower court, but this case is not applicable in any way to the issues here. It was strictly a federal case in which the court held that Congress had the right to tax the income of an Osage Indian if it saw fit to do so and that the income tax statute was sufficiently broad to include the income of a member of the Osage Tribe of Indians with a certificate of competency; but the Supreme Court, as stated in *Jaybird Mining Company* v. *Weir, supra,* has distinctly held that the United States could impose a tax on its own instrumentalities, and the fact that it did so did not mean that the state could impose a tax.

Conclusion.

In conclusion, we refer to the dissenting opinion of the Honorable EDWIN R. MCNEILL, Chief Justice of the Supreme Court of the State of Oklahoma (R. 35), and the reasoning and authorities supporting same and deem it unnecessary to reiterate what the court has said and respectfully submit that the majority opinion of the Supreme Court of the State of Oklahoma is in error in not requiring the State Treasurer to return the funds sued for in this case, and that the judgment should be reversed for the reasons, as we believe, that the mineral rights reserved to the Osage tribe of Indians, and the income received therefrom from oil and gas leases, is a federal instrumentality for the protection of the dependent wards of the government, and that a tax against the members of the tribe upon the income from said mineral resources amounts to the imposition of a tax upon the mineral rights of the Osage tribal property, and that it is beyond the power of the State of Oklahoma to impose such a tax.

Respectfully submitted,

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